

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances of the case as set forth in the Board's prior order are incorporated herein by reference. The relevant facts are as follows.

On November 1, 2017 appellant, then a 70-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that he developed right knee osteoarthritis due to factors of his federal employment.⁴ He noted that he first became aware of his condition on June 6, 2007 and realized its relationship to his federal employment on August 24, 2017. On the reverse side of the claim form C.L., a human resource specialist for the employing establishment, noted that appellant was last exposed to the employment conditions alleged to have caused his disease or condition on January 9, 2004, the date he stopped work and did not return. She also reported that appellant first reported the condition to his supervisor on November 8, 2017. C.L. controverted appellant's claim alleging that it was not timely filed within three years from the date of onset or last exposure.

Appellant provided a statement dated July 18, 2017. He recounted that he had worked for the employing establishment for 24 years and described in detail his work duties as a mail handler and letter carrier. Appellant noted that his job was very physical and that in the winter months he would slip, trip, stumble, and fall like other letter carriers. He also recounted that he did not know when his arthritis started, but as he worked, his knee became painful to the point that he sought medical treatment.

Appellant separated from federal employment due to disability, effective September 16, 2006.

Appellant provided reports dated September 9, 2005 through March 27, 2009 by Dr. Mark S. Mieth, a Board-certified orthopedic surgeon. In treatment notes dated November 10 and 17, 2006, Dr. Mieth indicated that appellant was seen for follow up of bilateral knees degenerative joint disease. He noted a date of injury of January 9, 2004 and reported that the injury was "work-related."

OWCP also received an August 24, 2017 report from Dr. Kevin Scott, a Board-certified orthopedic surgeon, who described appellant's employment duties as a mail handler and letter carrier. Dr. Scott indicated that appellant developed osteoarthritis in his right knee and noted that appellant underwent a right knee scope in 1997. He opined that right knee osteoarthritis was aggravated by his work activities, including lifting, walking, and climbing, which he performed on a daily basis for over 24 years starting in 1980.

³ *Order Remanding Case*, Docket No. 19-1457 (issued July 17, 2020).

⁴ OWCP assigned the claim OWCP File No. xxxxxx925. Appellant previously filed a traumatic injury claim (Form CA-1) for a right shoulder injury related to a January 9, 2004 employment incident. He stopped work on that date and did not return. OWCP assigned that claim OWCP File No. xxxxxx673 and accepted it for right shoulder rotator cuff tear.

In a development letter dated December 7, 2017, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence necessary to establish his claim. OWCP noted that the evidence of record was insufficient to establish that he provided a timely notice of his employment injury and provided a questionnaire for his completion. In a separate development letter of even date, it requested that the employing establishment provide a statement from a supervisor and additional information regarding the accuracy of appellant's alleged federal employment factors. OWCP provided both parties 30 days to respond.

Appellant completed and submitted OWCP's development questionnaire on December 19, 2017. He asserted that his claim was timely filed within three years that he became aware of the causal relationship between his condition and his federal employment. Appellant explained that he was not aware that his right knee condition was related to his employment until his examination with Dr. Scott on August 24, 2017 when Dr. Scott explained that his job duties contributed to the acceleration of his right knee arthritis.

In a letter dated December 19, 2017, appellant, through counsel, also responded to OWCP's development questionnaire. He alleged that, in his August 24, 2017 report, Dr. Scott provided a rationalized medical opinion establishing causal relationship between appellant's right knee condition and his federal employment duties.

By decision dated May 7, 2018, OWCP denied appellant's occupational disease claim, finding that it was untimely filed. It determined that the evidence of record did not support that appellant filed his claim within three years of the date of injury or date of last exposure or that his supervisor had actual knowledge of the claimed condition within 30 days of the date of injury.

On May 21, 2018 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review. The hearing was held on October 23, 2018.

In a statement dated October 16, 2018, appellant explained that in 2006 he was being treated by Dr. Mieth for bilateral knee arthritis and a work-related right shoulder injury. He indicated that he knew that he had arthritis in his knees since 2004, but he did not know that his arthritis was work related because he never injured his knees at work and Dr. Mieth never informed him that his bilateral knees were work related. Appellant contended that he did not know that his bilateral knee arthritis was related to his federal employment until Dr. Scott examined him on August 24, 2017.

In an October 23, 2018 memorandum, counsel alleged that OWCP improperly relied on Dr. Mieth's reports in determining that appellant knew or should have known of the relationship between his right knee osteoarthritis and his federal employment in 2006. He contended that the January 9, 2004 date of injury referred to appellant's previously accepted right shoulder injury claim, not his diagnosed bilateral knee osteoarthritis.

By decision dated January 7, 2019, OWCP's hearing representative affirmed the May 7, 2018 decision.⁵

Appellant appealed to the Board. In a July 17, 2020 order, the Board set aside the January 7, 2019 decision and remanded the case for OWCP to administratively combine the current claim with appellant's previous claim under OWCP File No. xxxxxx673, to be followed by a *de novo* decision.⁶ On August 28, 2020 OWCP administratively combined the claim files, with OWCP File No. xxxxxx673 serving as the master file.

In an October 29, 2020 development letter, OWCP informed appellant of the deficiencies of his claim. It advised him as to the type of additional factual and medical evidence necessary to establish his claim and provided a questionnaire for completion. OWCP afforded him 30 days to provide the necessary information.

Appellant submitted a completed development questionnaire dated November 18, 2020. He referred back to his July 18, 2017 statement for a description of his duties. Appellant also asserted that he was unaware of the relationship between his knee condition and his employment until he was informed by Dr. Scott on August 24, 2017.

Counsel also responded to OWCP's development letter on November 17, 2020. He alleged that appellant was unaware of the relationship between his employment activities and his right knee condition until his examination with Dr. Scott on August 24, 2017. Counsel contended that appellant filed his claim on November 1, 2017, which was within the three-year time limitation.

By *de novo* decision dated December 9, 2020, OWCP denied appellant's occupational disease claim, finding that the medical evidence of record was insufficient to establish that his diagnosed right knee condition was causally related to the accepted factors of his employment.

On March 8, 2021 appellant, through counsel, requested reconsideration. He asserted that Dr. Scott provided an unequivocal opinion establishing causal relationship between appellant's right knee degenerative joint disease and the accepted factors of employment.

By decision dated April 23, 2021, OWCP modified the December 9, 2020 decision and noted that the decision did not discuss whether appellant had timely filed his claim. It determined that the evidence of record established that appellant should have been aware in 2006 of a possible relationship between his bilateral knee condition and his federal employment. OWCP, therefore, denied appellant's claim because it was untimely filed.

⁵ Following the January 7, 2019 OWCP decision, appellant submitted a June 13, 2019 report by Dr. Mieth who noted right upper extremity examination findings of limited range of motion and assessed right shoulder osteoarthritis and right shoulder rotator cuff tear.

⁶ *Supra* note 3.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁷ has the burden of proof to establish the essential elements of his or her claim, including that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation of FECA,⁸ that an injury was sustained in the performance of duty as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.⁹ These are the essential elements of each and every compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.¹⁰

The issue of whether a claim was timely filed is a preliminary jurisdictional issue that precedes any determination on the merits of the claim.¹¹ In cases of injury on or after September 7, 1974, section 8122(a) of FECA provides that an original claim for compensation for disability or death must be filed within three years after the injury or death.¹²

In a case of occupational disease, the time for filing a claim begins to run when the employee first becomes aware, or reasonably should have been aware, of a possible relationship between his or her condition and his or her federal employment. Such awareness is competent to start the limitation period even though the employee does not know the precise nature of the impairment or whether the ultimate result of such affect would be temporary or permanent.¹³ Where the employee continues in the same employment after he or she reasonably should have been aware that he or she has a condition, which has been adversely affected by factors of his or her federal employment, the time limitation begins to run on the date of the last exposure to the implicated factors.¹⁴ Section 8122(b) of FECA provides that, in latent disability cases, the time limitation does not begin to run until the claimant is aware, or by the exercise of reasonable diligence should have been aware, of the causal relationship between the employment and the

⁷ *Supra* note 2.

⁸ *D.D.*, Docket No. 19-1715 (issued December 3, 2020); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁹ *Y.G.*, Docket No. 20-0688 (issued November 13, 2020); *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

¹⁰ *C.H.*, Docket No. 19-1781 (issued November 13, 2020); *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

¹¹ *R.T.*, Docket No. 18-1590 (issued February 15, 2019); *Charles Walker*, 55 ECAB 238 (2004); *see Charles W. Bishop*, 6 ECAB 571 (1954).

¹² 5 U.S.C. § 8122(a); *F.F.*, Docket No. 19-1594 (issued March 12, 2020); *W.L.*, 59 ECAB 362 (2008).

¹³ *See A.M.*, Docket No. 19-1345 (issued January 28, 2020); *Larry E. Young*, 52 ECAB 264 (2001).

¹⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.6 (March 1993); *see also S.O.*, Docket No. 19-0917 (issued December 9, 2019).

compensable disability.¹⁵ It is the employee's burden of proof to establish that a claim is timely filed.¹⁶

Even if a claim is not filed within the three-year period of limitation, it would still be regarded as timely under section 8122(a)(1) if the immediate supervisor had actual knowledge of his or her alleged employment-related injury within 30 days or written notice of the injury was provided within 30 days pursuant to section 8119.¹⁷ The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death.¹⁸

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish that he filed a timely claim for compensation pursuant to 5 U.S.C. § 8122(a).

Appellant submitted an occupational disease claim on November 11, 2017 alleging that he developed bilateral knee osteoarthritis due to factors of his federal employment. The evidence of record establishes that appellant was last exposed to the allegedly causative factors of employment on January 9, 2004 when he stopped work due to a work-related shoulder injury. Since he filed his occupational disease claim on November 11, 2017, his claim was filed outside the three-year time limitation period set forth in section 8122(a) of FECA.¹⁹

Appellant indicated on his Form CA-2 that he first realized the relationship between his condition and his federal employment on August 24, 2017. He alleged that he was not aware of the possible relationship between his condition and his federal employment until Dr. Scott examined him on August 24, 2017 and informed him that his job duties contributed to his right knee arthritis. The Board finds, however, that since appellant began receiving medical treatment for his bilateral knee osteoarthritis as early as 2005, appellant knew or reasonably should have known of a relationship between his diagnosed bilateral knee conditions and his federal employment before August 24, 2017.

In *L.H.*,²⁰ the Board determined that the medical evidence of record established that the claimant knew or reasonably should have known of the relationship between her foot conditions and her federal employment by December 2007. It noted that the claimant was diagnosed with bilateral plantar fasciitis on November 30, 2007 and that a series of treatment notes dated after November 30, 2007 each listed the diagnosis and recommended that she remain off work.

¹⁵ 5 U.S.C. § 8122(b).

¹⁶ *A.S.*, Docket No. 18-1094 (issued February 7, 2019); *Gerald A. Preston*, 57 ECAB 270 (2005).

¹⁷ 5 U.S.C. §§ 8122(a)(1), 8122(a)(2); *see also Larry E. Young*, *supra* note 13.

¹⁸ *R.H.*, Docket No. 17-0251 (issued November 28, 2018); *B.H.*, Docket No. 15-0970 (issued August 17, 2015).

¹⁹ *R.T.*, *supra* note 11.

²⁰ Docket No. 19-0818 (issued December 9, 2019).

Similarly, in *J.E.*,²¹ the Board found that the claimant was aware or should have been aware that her claimed bilateral foot injury was due to factors of federal employment before 2015 because the medical evidence demonstrated that appellant began receiving medical treatment for her bilateral foot condition beginning in 2002 during her employment and continued to receive treatment after she stopped working in 2009.

Likewise, in this present case, the medical evidence of record demonstrates that appellant began receiving medical treatment for bilateral knee degenerative joint disease as early as September 9, 2005 and continued to receive medical treatment for his bilateral knee condition until March 27, 2009. Treatment notes dated November 10 and 17, 2006 also provide a diagnosis of bilateral knee degenerative joint disease and indicate that the injury was work related. Appellant further indicated in his July 18, 2017 statement that he sought medical treatment because his knee became painful as he worked. The Board has previously held that when an employee becomes aware or reasonably should have become aware, that he has a condition which has been adversely affected by factors of his employment, such awareness is competent to start the running of the time limitations period, even though he does not know the precise nature of the impairment, or whether the ultimate result of such adverse effect would be temporary or permanent.²² In discussing the degree of knowledge required by the employee prior to filing a claim, the Board emphasized that he need only be aware of a possible relationship between his condition and his employment to commence the statute of limitations. The Board has not required that appellant have definitive evidence of a condition and causal relationship on the date the claim is filed.²³ As appellant acknowledged that his knee began to be painful at work and the medical evidence demonstrated that he sought medical treatment for his bilateral knee condition as early as September 2005, the Board finds that appellant knew, or reasonably should have known, as early as 2006 that, his bilateral knee condition was due to federal employment factors.

Appellant's claim would still be regarded as timely under FECA if his immediate supervisor had actual knowledge of his injury and any possible relation to his federal employment within 30 days, or if written notice of injury was given to his immediate supervisor within 30 days of injury.²⁴ In the present case, the Board finds that there is no evidence of record that appellant's immediate supervisor had actual knowledge of the injury and its possible relation to his federal employment within 30 days of the alleged injury, or that appellant provided written notice of injury within 30 days of the injury.²⁵ On the reverse side of the claim form the employing establishment indicated that appellant first reported his condition on November 8, 2017. As the evidence of record is insufficient to establish actual knowledge by appellant's supervisor of a work-related injury within 30 days, the Board finds that he has not established a timely claim.

²¹ Docket No. 16-1493 (issued May 7, 2018).

²² *D.R.*, Docket No. 18-1754 (issued April 4, 2019).

²³ *C.S.*, Docket No. 18-0009 (issued March 22, 2018); *Edward Lewis Maslowski*, 42 ECAB 839 (1991).

²⁴ *Supra* note 16.

²⁵ *See W.P.*, Docket No. 21-0107 (issued May 4, 2021); *see also C.S.*, *supra* note 23.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he filed a timely claim for compensation pursuant to 5 U.S.C. § 8122(a).

ORDER

IT IS HEREBY ORDERED THAT the April 23, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 5, 2022
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board